IN THE
MISSOURI SUPREME COURT

SC 85585

THELMA SCHEMBRE, et al.

Appellants,

vs.

MID-AMERICA TRANSPLANT SERVICES, et al.,

Respondents.

Appeal from the Circuit Court of the Twenty-Third Judicial Court of Missouri at Hillsboro, Jefferson County State of Missouri

---

SUBSTITUTE BRIEF OF RESPONDENT MID-AMERICA TRANSPLANT SERVICES

Edward S. Meyer, #25112
Brian D. Kennedy, #46534
RABBITT, PITZER & SNODGRASS, P.C.
Attorneys for Respondent
Mid-America Transplant Services
100 South 4th Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

On January 4, 2000, Plaintiffs-Appellants filed their Petition for intentional infliction of emotional distress, breach of contract, and mutilation of a dead body. (L.F. 13). Plaintiffs brought their cause in the Circuit Court of Jefferson County against Defendants Mid-America Transplant Services, Jefferson Memorial Hospital, and Christopher Guelbert. (L.F.13). The Honorable Gary P. Kramer granted summary judgment for Mid-America Transplant Services on June 14, 2002 and for Jefferson Memorial Hospital and Christopher Guelbert on July 5, 2002. (L.F. 186, 337). Plaintiffs then appealed to the Missouri Court of Appeals for the Eastern District.

After briefing and oral argument, the Missouri Court of Appeals handed down its decision in an Opinion filed on July 22, 2003. In its Opinion, the Court of Appeals affirmed the grant of summary judgment to Mid-America Transplant Services but reversed the Circuit Court's grant of summary judgment to Jefferson Memorial Hospital and Christopher Guelbert.

Pursuant to Missouri Supreme Court Rule 83.04, the plaintiffs and Defendants Jefferson Memorial Hospital and Christopher Guelbert timely filed Applications for Transfer to this Court. On October 28, 2003, the Court granted both Applications. The Court has final jurisdiction over this entire cause pursuant to Article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

On November 28, 1999, Frank Schembre entered the emergency room at Jefferson Memorial Hospital suffering from a heart attack. (L.F. 72- 73). He was pronounced dead at approximately 9:30. (L.F. 73). Shortly thereafter, Defendant Christopher Guelbert, a registered nurse, approached Thelma Schembre, wife of the deceased, and Bobby Joe Schembre and Laurie Laiben, children of the deceased. (L.F. 87, 109). Mr. Guelbert was an employee of Defendant Jefferson Memorial Hospital. (L.F. 81). Mr. Guelbert proceeded to discuss the possibility of organ and tissue donation with the Schembre family. (L.F. 87). The family told Mr. Guelbert that they could not recall specific conversations with the decedent regarding organ/tissue donation. (L.F. 87). However, the plaintiffs believed that organ/tissue donation was the type of thing that the decedent would have done to help others. (L.F. 87).

Mr. Guelbert informed the family that the decedent was not a suitable candidate for organ donation because organ donation is typically only viable for patients who have been on life support. (L.F. 88). Mr. Guelbert advised the family that the decedent was a candidate for tissue donation, specifically eyes and bone. (L.F. 89).

Mr. Guelbert completed the organ/tissue donation form in the presence of Plaintiff Thelma Schembre. (L.F. 94, 112-113). The consent form reflects that boxes were checked "no" for heart, liver, kidneys, skin, pancreas, and "any needed tissue." (L.F. 77, 92, 113). Boxes were checked "yes" for "eyes" and "bone." (L.F. 77, 92, 113). Mrs. Schembre signed the organ/tissue donation consent form after it was completed

by Mr. Guelbert. (L.F. 93, 113).

Plaintiffs assert that Mr. Guelbert told them only two to four inches of the lower leg would be removed. (L.F. 111). Plaintiffs did not have a detailed conversation with Mr. Guelbert regarding eye removal. (L.F. 110). Plaintiffs contend an unnamed female nurse told them that the entire eye would not be removed. (L.F. 116). Mr. Guelbert stated that there was no discussion of a limitation regarding the number of inches of bone. (L.F. 93). Mr. Guelbert's understanding was that when "bone" was indicated on the form, all of the bone from the lower extremities would be removed. (L.F. 103). Mr. Guelbert stated that he explained to the plaintiffs that all the long bones of the leg would be removed. (L.F. 100).

Defendant Mid America Transplant Services (MTS) was contacted after Mrs. Schembre signed the consent form to donate her husband's bones and eyes. (L.F. 124). Mr. Matthew Thompson, a tissue procurement coordinator, received and reviewed the tissue consent form. (L.F. 124). Mr. Thompson and two other MTS employees then proceeded to Jefferson Memorial Hospital in order to procure the donated tissues from the decedent. (L.F. 132-33). Mr. Thompson was aware only of the restrictions placed on the donation as stated on the consent form. (L.F. 134, 137). Those limitations were that the kidneys, liver, skin, pancreas, heart and "any other needed tissue" were not to be removed. (L.F. 77). Other than the form, no additional limitations were communicated at any time to MTS personnel. (L.F. 137). Neither Mr. Guelbert nor any member of the decedent's family conveyed to MTS restrictions regarding corneas or

two to four inches of bone. (L.F. 137).

Upon arrival at the hospital, Mr. Thompson and the MTS tissue recovery team proceeded to remove tissues from the decedent in accordance with the consent form and MTS' standard procedures. (L.F. 78, 134-35). In 1998, it was standard procedure when "bone" was checked to remove bones from the lower extremities. (L.F. 137). MTS removed decedent's femur, tibia, fibula, iliac crest, and fascia lata in the left and right legs. (L.F. 78, 139). When removing leg bone, it was standard procedure to remove the bone at the iliac crest, where the hip is located. (L.F. 133). It also was standard procedure to remove the attached fascia lata, connective muscles and tissues, when removing the leg bones. (L.F. 134). MTS also removed the decedent's eyes. (L.F. 139).

Plaintiffs were informed by an employee of Vinyard Funeral Home that all of the leg bones and "pelvic girdle" of the decedent had been removed. (L.F. 434). Plaintiffs also came to believe that the decedent's heart was removed. (L.F. 434). The MTS procedure report form, as a standard, contains the typewritten phrase "whole heart removed." (L.F. 78, 140). However, none of the boxes or areas on the form were marked relating to heart removal. (L.F. 78, 140). Furthermore, the MTS recovery team did not in fact remove decedent's heart. (L.F. 140).

Plaintiffs filed the underlying Petition on January 4, 2000. (L.F. 13). All defendants filed Motions for Summary Judgment based in part on the Uniform Anatomical Gift Act as enacted in Missouri at Section 194.210, R.S.Mo. (L.F. 186, 337). After the motions were briefed and argued, the Honorable Gary P. Kramer granted

summary judgment for both defendants. (L.F. 186, 337).

After briefing and oral argument, the Missouri Court of Appeals handed down its decision in an Opinion filed on July 22, 2003. In its Opinion, the Court of Appeals affirmed the grant of summary judgment to Mid-America Transplant Services but reversed the Circuit Court's grant of summary judgment to Jefferson Memorial Hospital and Christopher Guelbert.

Pursuant to Missouri Supreme Court Rule 83.04, the plaintiffs and Defendants Jefferson Memorial Hospital and Christopher Guelbert timely filed Applications for Transfer to this Court. On October 28, 2003, the Court granted both Applications. The Court has final jurisdiction over this entire cause pursuant to Article V, section 10 of the Missouri Constitution.

POINT RELIED ON

1. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT **TO DEFENDANT MID-AMERICA TRANSPLANT SERVICES, BECAUSE DEFENDANT MID-AMERICA TRANSPLANT SERVICES WAS IMMUNE FROM SUIT UNDER §194.270.3, R.S.Mo., IN THAT IT ACTED IN GOOD FAITH AND WITHOUT NEGLIGENCE IN COMPLYING WITH THE CONSENT FORM PROVIDED.**

Commercial Finance Corp. vs. Mid-America Marine Supply Co., 854 2d. 371 (Mo. Sup. Ct. banc 1993);

Nicoletta vs. Rochester Eye and Human Parts Bank, Inc., 136 Misc. 2d 1065, 519 N.Y.Supp. 2d. 928 (N.Y. Sup. Ct. 1987);

Rahman vs. Mayo Clinic, 578 N.W.2d 802 (Minn. Ct. App. 1998);

Section 194.270.3, R.S.Mo.

ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN GRANTING MID-AMERICA TRANSPLANT SERVICES' MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANT MID-AMERICA TRANSPLANT SERVICES WAS IMMUNE FROM SUIT UNDER §194.270.3 R.S.MO. IN THAT IT ACTED IN GOOD FAITH AND WITHOUT NEGLIGENCE IN COMPLYING WITH THE CONSENT FORM PROVIDED.

A. Standard of Review

The standard of review on appeal for a grant of summary judgment is essentially *de novo.* ITT Commercial Finance Corp. vs. Mid-America Marine Supply Co., 354 S.W.2d. 371, 376 (Mo. Sup. Ct. banc 1993). Summary judgment can be granted where the movant can establish that there are no genuine issues of material fact and that movant is entitled to a judgment as a matter of law. Id. at 377. For purposes of summary judgment, a genuine issue exists when the record contains evidence that establishes two plausible but contradictory accounts of the essential facts. Id. at 382. A genuine issue is a dispute about what is real and not merely argumentative, imaginary or frivolous. Id.

2. Discussion

In the instant case, the trial court was correct in holding that the Uniform Anatomical Gift Act's grant of immunity applied to Mid-America Transplant Services (hereinafter "MTS"). Missouri is one of the many states that has adopted and codified the Uniform Anatomical Gift Act (UAGA) at §194.211 through 194.29,1 R.S.Mo. Section 194.280 of the UAGA specifies that Missouri's UAGA should be "so construed as to effectuate its general purpose to make uniform the laws of those states which enact it." Section 194.200, R.S.Mo., even provides a reference table of other states that have enacted the UAGA.

Among the states enumerated in §194.200, R.S.Mo., New York was one of the first jurisdictions in which there was litigation relating to the good faith provision of the UAGA. In Nicoletta vs. Rochester Eye and Human Parts Bank, Inc., 136 Misc. 2d 1065, 519 N.Y.Supp. 2d. 928 (N.Y. Sup. Ct. 1987), the court held that the determination of good faith under the UAGA is a proper subject for summary judgment. The court reasoned that in adopting the specific regulatory scheme of the UAGA, **the legislature had established an objective standard for good faith. Id. at 1068-69. Other states that have enacted the UAGA have followed the reasoning in Nicoletta and have held that good faith immunity under the UAGA is the proper subject for summary judgment. *See* Andrews vs. Alabama Eye Bank, 727 So. 2d 62 (A1a. Sup. Ct. 1999); Brown vs. Delaware Val. Trans. Program, 615 A. 2d 1379 (Penn. Super. Ct. 1992); Kelly-Nevils vs. Detroit Receiving Hospital, 526 N.W.2d 15 (Mich. Ct. App. 1994); Lyon vs. U.S., 843 F.Supp. 531 (D. Minn. 1994); and Rahman vs. Mayo Clinic, 578 N.W.2d 802 (Minn. Ct. App. 1998). This position is consistent with the inherent nature of legal immunity, which is to protect the recipient from undue prosecution or litigation at the earliest stage possible.**

The Missouri legislature enacted the UAGA with the intent that it be applied in a manner consistent with the manner in which other enacting states apply it. §194.280, R.S.Mo. Indeed, it would be an exercise in futility to enact a "uniform" statute of any sort if the legislature expected Missouri courts to apply it without any heed to the decisions of courts in other enacting states. Missouri's UAGA is similar to other states and provides a similar objective statutory scheme for how gifts of organ/tissue can be

donated, received or revoked. *See generally* §§194.211 through 194.290, R.S.Mo. Similarly, by developing a specific statutory scheme, Missouri's legislature created an objective standard defining good faith. Therefore, as the trial court properly held, under Missouri's UAGA, "good faith" is a question of law and the proper subject matter for summary judgment.

Missouri's UAGA provides that:

> **A person who acts without negligence and in good faith and in accord with the terms of this act or with anatomical gift laws of another state or foreign country is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act.**

§194.270.3 R.S.Mo.

Other states which have enacted the UAGA have decided that "good faith" is "an activity involving an honest belief, absence of malice and absence of design to defraud or seek unconscionable advantage." Rahman vs. Mayo Clinic, 578 N.W.2d 802, 806 (Minn. Ct. App. 1998) (*citing* BLACK'S LAW DICTIONARY, p. 623 (5th Ed. (1979)).

Defendant MTS acted in good faith compliance with the provisions of the UAGA and was therefore entitled to immunity. MTS complied with the UAGA by first receiving a written consent form. (L.F. 137). The form on its face appeared to be signed by the decedent's wife, a member of the class UAGA authorizes to donate tissues and organs. (L.F. 77); §194.220, R.S.Mo. This consent form in fact was signed by the decedent's wife, Thelma Schembre. (L.F. 93, 113). Courts have found good faith immunity exists even when these basic provisions of the UAGA were not followed. For

example, in the case of Nicoletta vs. Rochester Eye and Human Parts Bank, Inc., 136 Misc. 2d 1065, 519 N.Y.Supp. 2d. 928 (N.Y. Sup. Ct. 1987), the court found good faith immunity despite the fact that the consent form had been signed by someone other than the decedent's lawful spouse. In the present case, there is no dispute that Defendant MTS complied with the basic provisions of the UAGA. Plaintiffs are asking this Court to engraft new requirements onto the statute.

That Defendant MTS acted in good faith under the UAGA is further illustrated by the fact that it removed only what was specified on the consent form. (L.F. 139). The consent form was unambiguous and it was reasonable for the recovery team to rely on the form. (L.F. 81). The consent form received by MTS contained the separate blanks for "eyes" and "bone", both of which were checked. (L.F. 77). As Wayne Thompson testified at deposition, it was standard practice in 1998 when the word "bone" was marked to remove all leg bones, up to and including the iliac crest. (L.F. 137). It was also standard practice when removing the leg bones to remove the connected fascia lata. (L.F. 134). Mr. Guelbert was aware that the standard procedure in 1998 included the removal of the connected fascia lata. (L.F. 103). MTS followed its own protocols and removed the standard areas of the lower extremities. (L.F. 78, 139). It is further evident that MTS followed its protocols because although only the word "bone" was checked, MTS removed bones only from the lower extremities and not from anywhere else. (L.F. 78). Plaintiffs failed to establish that MTS acted outside of its procedures and removed anything other than the items to which the word "bone" typically referred.

They did not demonstrate that MTS's actions deviated from its standard protocols and were thereby negligent.

Plaintiffs argue that MTS erred by removing "any needed tissue." The blank for "any needed tissue" was checked "no" on the consent form. (L.F. 77). However, plaintiffs refer to not a single fact in the record that suggests that any tissue that was obtained that would be considered "any needed tissue." The consent form does not state, as plaintiffs would have the Court believe, that "no tissues" were to be removed. (L.F. 77). MTS removed only tissues naturally associated with the removal of the "bone", specifically, the fascia lata. (L.F. 78, 134). The fascia lata is connective tissue covering the muscles of the upper leg which is used in transplant. (L.F. 134). MTS did not remove other useful tissues or other tissues needed by other patients. (L.F. 78, 134). Plaintiffs failed to establish that MTS was negligent is removing anything but those items specified on the consent form.

Plaintiffs argue further that MTS exceeded the scope of Mrs. Schembre's consent. Significantly, Defendant MTS was not involved in any way in obtaining the consent form. (L.F. 87). It was undisputed that Christopher Guelbert, an employee of Memorial Hospital, filled out the consent form. (L.F. 81). Plaintiffs failed to show that MTS exceeded the scope of consent *as it appeared* on the provided form. Although Mrs. Schembre may have believed she was conveying a limited consent to Mr. Guelbert, her alleged restrictions do not appear on the face of the consent form. (L.F. 77). Plaintiffs failed to establish how MTS had a reason to know or believe that the consent was

somehow defective or inconsistent with the wishes of the donor. MTS was not contacted by anyone from the Schembre family or Mr. Guelbert on or before November 28, 1998 to further limit or revoke the gift. (L.F. 137). Plaintiffs failed to produce any facts that demonstrate MTS exceeded the scope of consent provided on the form.

Plaintiffs also suggest that the grant of summary judgment was improper because the trial court failed to consider the word "negligence" in its Opinion. The May 17, 2002 Order of the trial court clearly and correctly states the standard as providing that the donee receives a limited immunity from suit if the donee is not *negligent* and acts in "good faith" (L.F. 186) (emphasis added). The trial court was aware of and applied the correct standard. In ruling that the defendant was entitled to "good faith" immunity under the UAGA, the trial court necessarily ruled that there was no genuine factual dispute as to negligence. There simply was no evidence from which a jury could determine that MTS was negligent.

Plaintiffs chose not to file a Substitute Brief with this Court. Nevertheless, in their Application for Transfer, plaintiffs argue that there was a question of fact as to whether Defendant MTS exceeded the scope of Mrs. Schembre's consent, because during deposition, Wayne Thompson of MTS admitted that "blood" (marked "no" on the consent form) was removed during the transplant process. Plaintiffs did not raise this argument in the Court of Appeals and are now attempting to alter the basis for their claim that there was a genuine issue of fact as to whether Defendant MTS was

entitled to good faith immunity under the UAGA. This is contrary to the express language of Missouri Supreme Court Rule 83.08(b). Consequently, the Court should refuse to consider this new argument. Despite the waiver, defendant will respond briefly to it. Mr. Thompson testified that blood was typically "drawn" from the femoral artery during the musculoskeletal removal process. (L.F. 136-37). He then testified that the amount of blood drawn varied on a case-by-case basis in response to plaintiffs' attorney's question, "Is there a typical amount that's drawn or some minimum amount that is needed?" (L.F. 137)(emphasis added). The phrasing of the question itself indicates clearly that any "blood" that is drawn is removed as a necessary and incidental part of the musculoskeletal removal process and that plaintiffs' attorney himself knew this when he deposed Mr. Thompson.[1] The plaintiffs are attempting the create a fictitious factual dispute through selective citation of the record without any regard for context.

Plaintiffs also argue in their Application for Transfer that there was a genuine

---

[1]**Although no one asked Mr. Thompson at his deposition what the purpose was of drawing blood during the musculoskeletal transplantation process, and there is no other evidence in the record explaining the purpose, obvious explanations include determination of organ/tissue compatibility as well as screening for any diseases or conditions that would render the organ/tissue unsuitable for transplant, such as hepatitis or Human Immunodeficiency Virus (HIV).**

dispute of fact as to whether Defendant MTS acted in good faith because the consent form allegedly was ambiguous. Yet again, plaintiffs did not raise this argument in the Court of Appeals and are now attempting to alter the basis for their claim that there was a genuine issue of fact as to whether Defendant MTS was entitled to good faith immunity under the UAGA. This is contrary to the express language of Missouri Supreme Court Rule 83.08(b). Consequently, the Court should refuse to consider this new argument. Despite the waiver, defendant will respond briefly to this new argument as well.

Plaintiffs first argue that the consent form was ambiguous because the word "yes" had been crossed-out with regard to the removal of "Any Needed Organ or Tissue." However, it is obvious from review of the Consent Form that "no" is clearly checked. There is no ambiguity on the face of the consent form. Furthermore, Defendant MTS in fact did not remove "Any Needed Organ or Tissue" from the decedent. Therefore, any ambiguity is immaterial. No dispute about whether the removal of "Any Needed Organ or Tissue" was authorized is relevant to the issue of whether MTS acted in good faith. Consequently, no dispute as to this fact would preclude the grant of summary judgment to MTS.

Plaintiffs second argument under this heading is that Wayne Thompson had never previously seen the type of consent form signed by Mrs. Schembre. While Mr. Thompson did so testify, plaintiffs do not explain why Mr. Thompson's familiarity with the form used is relevant to Defendant MTS' immunity under the UAGA. Moreover,

they ignore the rest of Mr. Thompson's testimony. He went on to say that he determines the adequacy of the form received based upon whether the form contains:

> **Specific information of the name of the donor, potential donor, the name of the next-of-kin, the tissues that has [sic] been consented for, signatures of the next-of-kin and other information giving us permission for things such as the release of medical records and blood testing.**

(L.F. 125). All of this information was present on the consent form signed by Mrs. Schembre. The UAGA requires nothing more. Therefore, Mr. Thompson's familiarity or lack of familiarity with the type of consent form signed by Mrs. Schembre cannot create a genuine dispute as to any fact material to Defendant MTS' good faith immunity under the UAGA.

CONCLUSION

It is abundantly clear from the undisputed facts in the record that Defendant MTS acted in good faith. Plaintiffs did not allege and cannot show that MTS acted with malice or intent to defraud. Plaintiffs did not produce any evidence that MTS deviated from its protocols or that it was negligent in any manner. Plaintiffs failed to establish that MTS exceeded the scope of the consent form that was provided. Plaintiffs completely failed to demonstrate that MTS was aware of any of plaintiffs' alleged restrictions on consent. Defendant MTS complied in every way with the Uniform Anatomical Gift Act as enacted by the Missouri legislature. Consequently, defendant was entitled to good faith immunity as provided in §194.270.3, R.S.Mo., and summary judgment on this issue was entirely appropriate. The Order of the trial court should

therefore be affirmed by this Court, or the cause should be retransferred to the Missouri Court of Appeals for the Eastern District for reinstatement of its July 22, 2003 Opinion.

Edward S. Meyer, #25112
Brian D. Kennedy, #46534
RABBITT, PITZER & SNODGRASS, P.C.
Attorneys for Respondent
Mid-America Transplant Services
100 South 4th Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)

CERTIFICATE OF SERVICE

I hereby certify, in accordance with Supreme Court Rule 85.05(a) that the original and nine copies of RESPONDENT'S SUBSTITUTE BRIEF with floppy disk in the above-entitled cause were filed this 8TH day of December, 2003 with the Clerk of the Supreme Court, and two copies of the entire BRIEF with a floppy disk were mailed, postage pre-paid addressed to Mr. Robert J. Lenze, ROBERT J. LENZE, P.C., Attorneys for Appellants, 3703 Watson Road, St. Louis, MO 63109; Mr. Randall D. Sherman, WEGMANN, GASAWAY, STEWART, SCHNEIDER, DIEFFENBACH, TESREAU & SHERMAN, P.C., Attorneys for Respondent Jefferson Memorial Hospital, P.O. Box 740, 455 Maple Street, Hillsboro, MO 63050; and Ms. Judith Brostron, LASHLY & BAER, Attorney for Respondent, 714 Locust, St. Louis, MO 63101.

_____

CERTIFICATE OF COMPLIANCE

I hereby certify this brief contains all information required by Missouri Supreme Court Rule 55.03, it complies with the limitations contained in Missouri Supreme Court Rule 84.06, it contains 4,136 words, in Word Perfect 7.0; the disk provided has been scanned for viruses and is virus-free.

_____
Edward S. Meyer, #25112
Brian D. Kennedy, #46534
RABBITT, PITZER & SNODGRASS, P.C.
Attorneys for Respondent
Mid-America Transplant Services
100 South 4th Street, Suite 400
St. Louis, Missouri 63102-1821
(314) 421-5545
(314) 421-3144 (Fax)

APPENDIX TABLE OF CONTENTS